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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

VERNDELL RAYMONE HICKS,

Defendant and Appellant.

F071016

(Super. Ct. No. BF155264A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Brian M. McNamara, Judge.

Peter J. Boldin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and John A. Bachman, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Verndell Raymone Hicks appealed his 2015 sentence, arguing it improperly included a one-year enhancement for a prior prison term under Penal Code¹ section 667.5, subdivision (b) (section 667.5(b)). That enhancement was based on a 2013 felony drug possession conviction, which was designated a misdemeanor pursuant to Proposition 47, the Safe Neighborhoods and Schools Act (Act), one year after he was sentenced in 2015, while the appeal was pending. In our unpublished opinion filed August 24, 2017, we held that Proposition 47 applied to section 667.5(b) enhancements in judgments that were not yet final. We remanded the matter for the trial court to strike the sentence enhancement unless it determined Hicks posed an unreasonable risk of danger to public safety. (§ 1170.18, subds. (b) & (c); *Harris v. Superior Court* (2016) 1 Cal.5th 984, 992.)

Hicks petitioned for review to the California Supreme Court, which was granted. On September 26, 2018, the Supreme Court transferred the matter back to this court, with directions to vacate our previous opinion and reconsider the matter in light of *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*).

In supplemental post-transfer briefing, Hicks also asserts Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1–2, eff. Jan. 1, 2019) (Senate Bill 1393) should apply retroactively to his case and the matter should be remanded for the trial court to consider exercising its discretion to dismiss his section 667, subdivision (a)(1) prior serious felony enhancement.

We strike the section 667.5(b) enhancement pursuant to *Buycks* and remand the matter for the trial court to consider exercising its discretion to strike or dismiss the section 667, subdivision (a) enhancement.

¹ References to code sections are to the Penal Code.

FACTUAL AND PROCEDURAL SUMMARY

At around 1:00 a.m. on June 2, 2014, Hicks punched Donald Craine in the face as Craine lay sleeping in bed. Craine awoke when he was punched in the right eye. Craine did not see who hit him, but when he awoke after being punched Hicks was standing over him. Hicks appeared angry and told Craine not to call the police.

The punch caused two facial fractures, one to Craine's "right medial orbit, and also the floor of the orbit." The punch also caused a seizure lasting four to five minutes. The injuries were consistent with a punch, not with falling or being hit with an object.

Craine testified that his eye "is broken in three spots, my sinus cavity is crushed," and he had vision problems. At the time of trial, Craine was "still numb, have a constant problem in the sinus cavity. And I had a brain infection."

On December 17, 2014, the jury found Hicks guilty of count one, assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)), and count two, felony battery resulting in serious bodily injury (§ 243, subd. (d)). The jury also found true a section 12022.7, subdivision (a) personal infliction of great bodily injury enhancement appended to count one.

The trial court found true the allegation that Hicks had suffered three prior convictions arising out of two separate March 2, 2004, events that qualified as serious felonies and strikes, within the meaning of section 667, subdivisions (a) and (e). It also found true that Hicks had served a prior prison term within the meaning of section 667.5(b), arising out of a 2013 felony drug possession conviction.

At the February 5, 2015, sentencing hearing, the trial court struck two of the prior 2004 convictions and sentenced Hicks to a total term of 17 years in prison, calculated as follows: the upper term of four years on count 1, doubled to eight years for the remaining strike; three years for the section 12022.7 enhancement; five years for the one remaining

prior serious felony strike; and one year for the section 667.5(b) enhancement. A term of eight years for the count 2 offense was imposed, but stayed pursuant to section 654.

Hicks filed a written statement that he was appealing his case on February 11, 2015. The abstract of judgment was filed February 19, 2015. The abstract sets forth an incorrect sentence of two years for the count two conviction.²

DISCUSSION

Hicks contends that because his 2013 prior felony conviction for drug possession was reduced to a misdemeanor in 2016, before the judgment and sentence for his current convictions was final, the one-year section 667.5(b) enhancement should be stricken. In a related argument, he asserts defense counsel rendered ineffective assistance by not seeking Proposition 47 relief prior to sentencing on the instant offenses.

Hicks also maintains that Senate Bill 1393 should apply retroactively to his case and therefore, the matter should be remanded for the trial court to consider striking the section 667, subdivision (a)(1) prior serious felony enhancement.

I. Section 667.5 and Proposition 47

Hicks committed the offenses that are the subject of this appeal in June 2014. Proposition 47 was enacted and became effective in November 2014. Hicks was convicted in December 2014, was sentenced in February 2015, and appealed. While his appeal was pending, Hicks petitioned the Los Angeles Superior Court in February 2016 to have his 2013 felony conviction designated a misdemeanor under Proposition 47 (§ 1170.18). The petition was granted in March 2016.³

The issue as presented is whether the additional one-year enhancement imposed by the trial court pursuant to section 667.5(b), for the 2013 prior conviction must now be

² The trial court is directed to correct this clerical error in the modified abstract of judgment.

³ Hicks's request to take judicial notice filed March 11, 2016, is hereby granted.

stricken because, subsequent to Hicks's conviction and sentencing, the 2013 prior conviction was reduced to a misdemeanor pursuant to section 1170.18, subdivision (f). We again conclude it must be reversed because the sentence and judgment for the current offenses were not final at the time the 2013 felony was reclassified.

Shortly before Hicks's trial, on November 4, 2014, voters enacted Proposition 47, which went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) As relevant here, the Act reduced certain felony drug possession offenses to misdemeanors, unless committed by an ineligible defendant. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108; see § 1170.18, subd. (i).) It also provided a mechanism by which a person who had completed his or her sentence for a conviction of a felony that was made a misdemeanor by the Act, could apply to the trial court that entered the judgment of conviction and have the felony offense designated as a misdemeanor. (§ 1170.18, subs. (f), (g).) Section 1170.18, subdivision (k) specifies that any "felony conviction that is ... designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes" except resentencing does not permit the person to own or possess a firearm.

Hicks contends the benefits of section 1170.18, subdivision (k) under Proposition 47 should apply to non-final judgments, like his. We agree. The plain language of Proposition 47 ("shall be considered a misdemeanor for all purposes") explicitly anticipates misdemeanor classification will affect the collateral consequences of felony convictions, except permitting ownership or possession of a firearm. Section 1170.18, subdivision (k)'s "for all purposes" language is broad, and reflects the voters' clear intention that—with the exception of firearm possession—reclassified misdemeanors be treated like any other misdemeanor offense, including for purposes of enhancements under section 667.5, subdivision (a). (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 746.)

The Supreme Court in *Buycks* granted review in three cases to resolve issues concerning Proposition 47’s effect on felony-based enhancements in resentencing proceedings under section 1170.18. Among them, the Supreme Court reviewed the case of Laura Reynoso Valenzuela, who was found guilty of three felony offenses, and had a prior felony conviction for receiving stolen property under section 496. (*Buycks, supra*, 5 Cal.5th at pp. 873–874.) At sentencing, Valenzuela received a one-year consecutive term for the section 667.5(b) enhancement and filed an appeal. While the appeal was pending, Valenzuela successfully petitioned to have her section 496 conviction redesignated a misdemeanor. (*Buycks, supra*, at p. 874.)

As a general proposition, the Supreme Court found “the reduction of a felony conviction to a misdemeanor conviction under Proposition 47 exists as ‘a misdemeanor for all purposes’ prospectively, but, under the *Estrada*[⁴] rule, it can have retroactive collateral effect on judgments that were not final when the initiative took effect on November 5, 2014.” (*Buycks, supra*, 5 Cal.5th at p. 883.)

Turning to the issue of enhancements, the court found “as to nonfinal judgments containing a section 667.5, subdivision (b) one-year enhancement, we conclude that Proposition 47 and the *Estrada* rule authorize striking that enhancement if the underlying felony conviction attached to the enhancement has been reduced to a misdemeanor under the measure.” (*Buycks, supra*, 5 Cal.5th at p. 888.)

⁴ Generally, amendments to the Penal Code do not apply retroactively. (§ 3.) However, it has long been held that where a statute does not expressly prohibit retroactive application, “If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then ... it, and not the old statute in effect when the prohibited act was committed, applies.” (*In re Estrada* (1965) 63 Cal.2d 740, 744 (*Estrada*).) “A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari [with the United States Supreme Court] have expired.” (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1465.)

The Supreme Court reasoned, “the resentencing of a prior underlying felony conviction to a misdemeanor conviction negates an element required to support a section 667.5 one-year enhancement. A successful Proposition 47 petition or application can reach back and reduce a defendant’s previous felony conviction to a misdemeanor conviction because the defendant ‘would have been guilty of a misdemeanor under’ the measure had it ‘been in effect at the time of the offense.’ (§ 1170.18, subds. (a), (f).) Therefore, if the ‘felony conviction that is recalled and resentenced ... or designated as a misdemeanor’ conviction becomes ‘a misdemeanor for all purposes,’ then it can no longer be said that the defendant ‘was previously convicted of a felony’ [citations], which is a necessary element for imposing the section 667.5, subdivision (b) enhancement. Instead, ‘for all purposes,’ it can only be said that the defendant was previously convicted of a misdemeanor.” (*Buycks, supra*, 5 Cal.5th at p. 889, fn. omitted.)

As to Valenzuela, the *Buycks* court concluded, “Because Valenzuela’s judgment ... was not final when Proposition 47 took effect, the *Estrada* rule applies to strike her section 667.5, subdivision (b) prior felony prison term enhancement.” (*Buycks, supra*, 5 Cal.5th at p. 896.)

Here, Hicks committed his 2014 crimes and sentence was imposed before the 2013 offense was reduced to a misdemeanor in 2016. However, the judgment in his 2014 case was not final at the time the 2013 conviction was reduced to a misdemeanor because that judgment was appealed and that appeal is currently pending. (See *People v. Towne* (2008) 44 Cal.4th 63, 80-81.)

In this case, *Buycks* makes clear that Hicks’s section 667.5(b) enhancement, now a misdemeanor, must be stricken. Much like in *Buycks*, Hicks’s case was pending appeal in this court, and therefore not final, when Hicks successfully petitioned to have his 2013 felony conviction redesignated as a misdemeanor. Accordingly, *Estrada* allows section 1170.18, subdivision (k) to retroactively apply to Hicks’s case. Since the 2013

conviction is now a misdemeanor for all purposes, it cannot be the basis for a section 667.5(b) enhancement, which requires the prior prison term be served for a felony conviction. Necessarily, the section 667.5(b) enhancement imposed must be stricken.

II. Ineffective Assistance of Counsel

Because we are reversing the 667.5(b) enhancement, we need not address the ineffective assistance of counsel claim.

III. Senate Bill No. 1393

The trial court enhanced Hicks's sentence by five years pursuant to section 667, subdivision (a). At the time, the trial court lacked discretion to do otherwise. As the applicable statutes then read, the trial court was required to impose a five-year consecutive term upon "any person convicted of a serious felony who previously ha[d] been convicted of a serious felony" (§ 667, former subd. (a)(1)), and the trial court had no authority "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667" (§ 1385, former subd. (b).).

Senate Bill 1393, which becomes effective January 1, 2019, has removed these restrictions and gives "courts discretion to dismiss or strike a prior serious felony conviction for sentencing purposes." (*People v. Garcia* (2018) 28 Cal.App.5th 961, 965.) The parties agree Senate Bill 1393 applies to Hicks's case. The parties disagree on whether the matter should be remanded, with the People contending the trial court would not strike the section 667, subdivision (a) enhancement even if it had the discretion to do so. We are not convinced the record is clear on this point.

At sentencing, the trial court found Hicks to be "outside the spirit of the three-strikes law." The trial court noted Hicks had completed his parole, was married with three children, had a trade, and had maintained a good employment record since 2012. The trial court found no circumstances in mitigation and three circumstances in

aggravation, warranting imposition of the upper term for the offense, but also granted some relief pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

Under these circumstances, we cannot say unequivocally that the trial court would have imposed the section 667, subdivision (a) enhancement even if it had the discretion not to do so. “Because it is highly unlikely that defendant’s judgment will ... be final by January 1, 2019, we remand the matter to the trial court for resentencing.” (*People v. Garcia, supra*, 28 Cal.App.5th at p. 973, fn. omitted.)

DISPOSITION

The Penal Code section 667.5, subdivision (b) one-year enhancement imposed for Hicks’s 2013 conviction is stricken. The matter is remanded to the trial court for resentencing and to consider exercising its discretion pursuant to Penal Code sections 667, subdivision (a) and 1385, subdivision (b), as amended by Senate Bill 1393. The trial court is directed to prepare an amended abstract of judgment after resentencing, and to disseminate the same to the appropriate authorities. In all other respects, the judgment is affirmed.

FRANSON, J.

WE CONCUR:

LEVY, Acting P.J.

PEÑA, J.